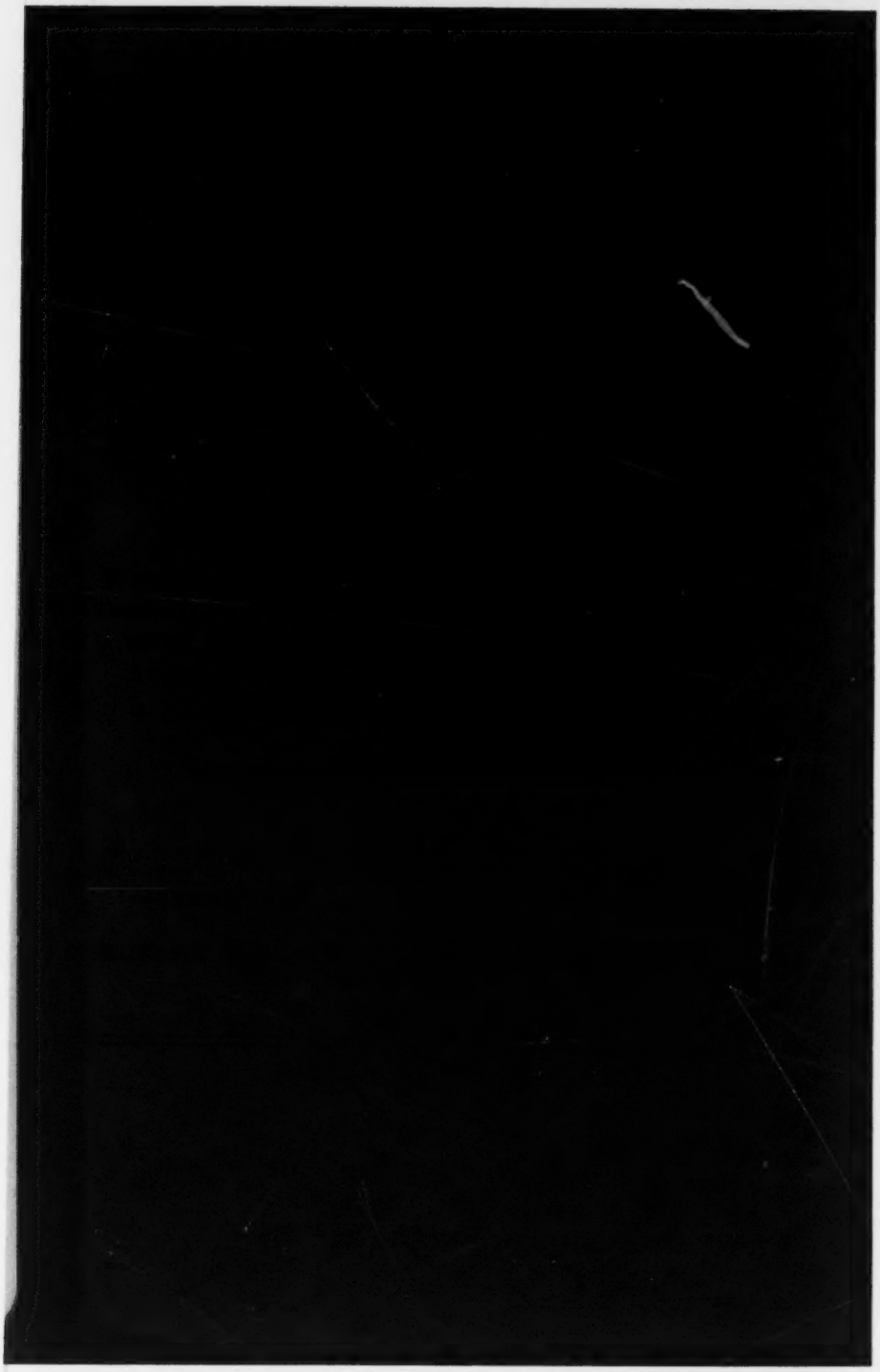

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Argument	10
Conclusion	17
Appendix	18

CITATIONS

Cases:

American Federation of Labor v. *National Labor Relations Board*, 308 U. S. 401 ..... 10, 12

Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197 16

International Association of Machinists v. *National Labor Relations Board*, 311 U. S. 72, affirming 110 F. (2d) 29 11

J. Greenebaum Tanning Co. v. *National Labor Relations Board*, certiorari denied, 311 U. S. 662 15

McQuay-Norris Mfg. Co. v. *National Labor Relations Board*, certiorari denied, No. 862, last Term 15

National Labor Relations Board v. *Bradford Dyeing Assn.*, 310 U. S. 318 11

National Labor Relations Board v. *Falk Corp.*, 308 U. S. 453 ..... 11, 12, 13

National Labor Relations Board v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261 16

Republic Steel Corp. v. *National Labor Relations Board*, 311 U. S. 7 9

Subin v. *National Labor Relations Board*, certiorari denied, 311 U. S. 673 15

Viking Pump Co. v. *National Labor Relations Board*, certiorari denied, 312 U. S. 680 15

Statutes:

National Labor Relations Act (July 5, 1935, 49 Stat. 449, 5 U. S. C. Supp. V, Sec. 150 et seq.):

Section 7 18

Section 8 ..... 7, 18

Section 9 ..... 12, 19

Section 10 ..... 12, 19

421129—41——1

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 627

WAREHOUSEMEN'S UNION, LOCAL 117, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinions of the court below (R. 543–559) are reported in 121 F. (2d) 84. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 497–530) are reported in 19 N. L. R. B. 778.

JURISDICTION

The decree of the court below (R. 560–562) was entered on May 5, 1941.[1] A petition for rehearing filed by petitioner (R. 566–584) was denied on June 21, 1941 (R. 598). The petition for a writ of certiorari was filed on September 20, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Board's action in directing and holding an election in proceedings under Section 9 of the Act barred it from prosecuting unfair labor practice charges under Section 10.

2. Whether the Board's finding that a so-called Truce Agreement did not apply in the event one of the parties seceded from the American Federation of Labor is proper.

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[1] The decree was entered in a proceeding instituted under Section 10 (f) of the National Labor Relations Act by petitioner, a labor organization aggrieved by the Board's order, to review and set aside said order (R. 1–13). A separate decree to like effect (R. 563–565) was entered by the court below at the same time in a cross-proceeding instituted by the Board under Section 10 (e) of the Act against McKesson & Robbins, Inc., for enforcement of the Board's order against the latter (R. 14–18). A companion petition for a writ of certiorari to review the latter decree has been filed as No. 628, this Term, by McKesson & Robbins, Inc.

3. A further question urged by petitioner, but which we think is not properly presented in this case, is whether the Board's order restraining exclusive recognition of an organization illegally recognized and granted a closed-shop contract is proper.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (July 5, 1935, 49 Stat. 449, 5 U. S. C. Supp. V, Sec. 150, et seq.) are set forth in the Appendix.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 497–530). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

Late in 1936, a "jurisdictional" dispute arose between petitioner (herein sometimes called the Teamsters), and Weighers, Warehousemen, and Cereal Workers, Local 38–117, International Longshoremen's Association (herein called the Longshoremen), both of which were then affiliated with the American Federation of Labor, concerning the right to organize, among others, the employees at two Seattle warehouses of McKesson & Robbins, Inc. (herein called McKesson) (R. 504–505; 243–

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

244, 396).[3] As a result of the controversy, these warehouses were closed from January 7 to June 14, 1937, when they reopened following the signing by the rival unions, at the instance of a Citizens' Committee, of an agreement (herein called the Truce Agreement) (R. 505–506; 396–397), and the signing by the individual employees of an attached statement in which they approved and agreed to be bound by the Truce Agreement (R. 508; 11–12, 31, 278–279, 397, 438).

In substance, the Truce Agreement, after reciting its purpose to settle the jurisdictional dispute, provided that the employees would return to work under their then union affiliations; that the Longshoremen would appeal to the October convention of the A. F. of L. from an adverse decision of the A. F. of L. Executive Council, rendered in February 1937, with respect to the jurisdictional dispute; and that both unions would be bound by the decision of the convention (R. 506; 10–12, 436–437). The Teamsters also proposed that the employees enter into a "supplemental" agreement providing that if the Longshoremen seceded from the A. F. of L., as they were then contemplating (R. 508; 252–253), the employees would nevertheless obey the jurisdictional decision of the A. F. of

[3] One of the warehouses was then owned by another company whose assets McKesson thereafter purchased on October 1, 1937 (R. 509). This fact does not bear on the merits of the case, and for convenience we refer to both warehouses as owned by McKesson.

L. convention and would apply for membership in the Teamsters if it won the decision (R. 507–508; 382–383, 439). This supplemental agreement, however, seemingly through accident, was never submitted to the McKesson employees and was not signed by them (R. 518; 386, 278–279).

In August 1937 the Longshoremen withdrew from the A. F. of L. and affiliated with the C. I. O.[4] On September 27, as a C. I. O. affiliate, the Longshoremen advised McKesson that it was the designated representative of a majority of McKesson's employees and requested bargaining rights (R. 508–509; 152–153, 178–179, 319–320). On October 13 the A. F. of L. convention ruled that the Teamsters had jurisdiction over warehouse employees (R. 509; 323). On October 27 McKesson and the Teamsters notified the McKesson employees that they were required to join the Teamsters (R. 509, 515; 141–142, 179–180, 340). The next day the Longshoremen filed with the Board petitions under Section 9 of the Act alleging the existence of questions concerning representation, and requesting an

[4] The change in affiliation was effected in the following manner: After securing approval in a referendum among the membership of the various locals (including Local 38–117 here involved) of the Pacific Coast District of the International Longshoremen's Association, the officers of the Pacific Coast District procured a charter from the C. I. O. for a new union styled The International Longshoremen and Warehousemen's Union, which in turn chartered Local 9, District 1, in succession to Local 38–117 (R. 508, 504; 252–254, 373–374).

investigation and certification of bargaining representatives (R. 510; 153; 5 N. L. R. B. 70).

Despite knowledge of the filing of the Section 9 petitions (R. 510; 153), McKesson, on November 15, entered into closed-shop contracts with the Teamsters and demanded that all its employees join that union (R. 510–511, 515–516; 12, 49–50, 60, 115–116, 151, 186–187, 235–236, 341–342). At that time 44 out of a total of 59 McKesson employees were members of the Longshoremen (R. 519–520; 231–232, 284–287, 308–310, 311–312, 54–55). A large majority of the employees refused to join the Teamsters (R. 511–513, 520; 54–56, 98, 342–343, 47–48, 50–51, 303–304, 314–315, 325–328, 402–403), whereupon McKesson, because of such refusal, discharged 17 of them (R. 513–514, 516–517, 522–523; Pet. 5–6, R. 38–40, 44, 47–48, 52–53, 140–142, 299, 316). On November 23, 1937, the Longshoremen filed charges of unfair labor practices with the Board's Regional Director based upon the discharges (R. 498).

On February 4, 1938, the Board at Washington, D. C., uninformed of the pendency of the charges of unfair labor practices (R. 521), issued an interlocutory decision in the representation case, in which it ruled that the Truce Agreement was intended merely to adjust a dispute between unions affiliated with the A. F. of L., that it was not intended to apply to a case where one of the unions left the A. F. of L., and that the closed-shop agreements did not constitute a bar to the proceedings.

It directed that an election be held in which persons employed on October 28, 1937, the date the representation petitions were filed, would be eligible to vote (R. 514; 5 N. L. R. B. 70). The election was held on February 18, 1938; the Teamsters received 32 votes and the Longshoremen 27 votes (R. 514; 198–202). The Board, however, issued no certification and took no further action in the representation proceedings because, after the election had been directed, the unfair labor practice charges which had been filed came to its attention (R. 514, 521).

The Board issued its complaint in the present case in July 1938, and after a hearing in September 1938, issued the order now in question (R. 498, 500, 527–530). The essential issue in the case was the validity of the closed-shop agreements pursuant to which the 17 employees were discharged; under the proviso to Section 8 (3) of the Act, (*infra,* p. 18), their validity depended upon whether the Teamsters represented a majority of the employees when the agreements were made on November 15, 1937.[5] Neither the Teamsters nor McKesson challenged the direct evidence, above noted (*supra,* p. 6), that a majority of the employees belonged to the Longshoremen on Novem-

[5] It was, of course, also a prerequisite to validity of the agreements under the Section 8 (3) proviso that petitioner be "not established, maintained, or assisted" by any unfair labor practice; however, the Board did not put in issue petitioner's compliance with this condition.

ber 15; they contended, however, that the Teamsters' majority status on that day was established (a) by the Truce Agreement and (b) by the representation election in February 1938. They contended further that the representation proceedings were a bar to prosecution of the unfair labor practice case.

The Board found, as it had in the representation proceedings (*supra,* p. 6), that the Truce Agreement was intended merely to adjust a jurisdictional dispute between organizations affiliated with the A. F. of L.; that the parties did not intend it to be binding upon the employees in case one of the parties seceded from the A. F. of L.; and that, therefore, the Truce Agreement did not constitute an agreement to designate, or a designation of, the Teamsters as majority representative on November 15, 1937 (R. 518). It also found that the February 1938 election could not be regarded as establishing the Teamsters' majority status on November 15, 1937, particularly since the employees' free choice had been restricted in the interim by the coercive discharges under the closed-shop agreements (R. 521). The Board held, finally, that its maintenance, inadvertently, of the representation proceedings while unfair labor charges were pending did not bar it from prosecuting the latter (R. 521). The Board concluded that petitioner did not represent a majority of the employees on November 15, 1937 (R.

519); that the closed-shop agreements were invalid (R. 522); and that the discharges pursuant thereto violated Section 8 (1) and (3) of the Act (R. 522–523, 527).

The Board's order required McKesson to cease and desist from its unfair labor practices and from giving effect to the closed-shop contracts; to reinstate the employees against whom it had discriminated; and to post notices (R. 527–529).[6]

On April 1, 1940, the Teamsters filed in the court below a petition to review and set aside the Board's order (R. 1–12). The Board answered, requesting enforcement of its order against McKesson (R. 13–18). On May 5, 1941, the court, Groner, C. J., dissenting, handed down its opinion (R. 543–559) and entered its decree (R. 560–562) enforcing the Board's order except for minor modifications not here material.[7] A petition for rehearing filed by petitioner (R. 566–584) was denied on June 21, 1941 (R. 598).

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[6] Because McKesson in discharging the men appeared to have acted in honest, though erroneous, reliance on the Truce Agreement, the Board in the exercise of its discretion eliminated all back pay up to the date of its order, directing instead that back pay should run only from and in the event of a refusal to comply with the reinstatement order (R. 526, 529).

[7] The court set aside the "work relief" provision in accordance with *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7, and set aside a provision requiring McKesson generally to cease and desist from interference with the rights guaranteed employees in Section 7 of the Act (R. 556–557).

ARGUMENT

1. Petitioner contends (Pet. 8, 9, 13, 14–21) that the Board acted arbitrarily and beyond its power in suspending further proceedings in the representation case after the holding of the election, and that the representation proceeding necessarily constituted a bar to the proceeding in the unfair practice case. The contention is without merit. McKesson's unfair labor practices, including the question of the validity of the closed-shop contracts with petitioner, were not in issue in the representation proceeding. The purpose, procedure, issues, and effect of a representation case under Section 9 of the Act are wholly different from those of an unfair labor practice case under Section 10. The former involves only a fact-finding inquiry into the identity of representatives for subsequent collective bargaining; the latter seeks to remedy unfair labor practices if found to have been committed, and to prevent their repetition. *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 405, 409. There is nothing in the Act which prescribes the order in which proceedings under Sections 9 and 10, respectively, must be conducted, or which requires the Board to delay an election in a representation case pending a hearing in an unfair labor practice case involving the same employer.

While the issue in the unfair labor practice case depended on whether petitioner represented a ma-

jority of the employees when the closed-shop agreements were made on November 15, 1937, neither the Board's action in ordering an election in February 1938, nor the results of that election, determined the question. Obviously ordering an election does not determine the majority status of a union participating in the election; that is the very purpose of the election. Likewise, the results of the election in February 1938 in the representation case could not determine the desires of the employees with respect to representation on November 15, 1937, the crucial date in the unfair labor practice case. This is particularly true where, as here, unfair labor practices intervened between the two dates, for it is settled that an election held while unfair labor practices remain unremedied cannot normally be taken to reflect the uncoerced will of the employees. *International Association of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 82–83, affirming 110 F. (2d) 29, 33 (App. D. C.); *National Labor Relations Board* v. *Bradford Dyeing Assn.,* 310 U. S. 318, 339–340; *National Labor Relations Board* v. *Falk Corp.,* 308 U. S. 453, 461.

There was nothing arbitrary in the Board's exercise of its authority. Petitioner's contention in this regard presupposes a power in the federal courts to pass upon matters pertaining to proceedings under Section 9 (c) in circumstances other than the exceptional situation covered by

Section 9 (d);[8] the Act, however, denies such power. *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 458–459; *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 405–406. But even if such power existed, there would be no warrant for its exercise. No prejudice to petitioner or McKesson resulted from the Board's action, since they entered into the closed-shop contracts before the election was either ordered or held. Certainly the holding of the election may not be said to have dissipated the effects of any unfair labor practices which might have been committed, thus rendering prosecution of the unfair labor practice case unnecessary; to the contrary, since the election took place while previous unfair labor practices remained unremedied, the election must be deemed to have been affected by the unfair labor practices, not *vice versa*. The Board having become aware, subsequent to directing the election, of the existence of the unfair labor practice charges, its action in investigating the charges and restraining the violations found was clearly proper and within its statutory authority (Section 10 (a), (b), (c)).

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[8] Section 9 (d) limits court review of Section 9 proceedings to cases in which the Board has issued an order under Section 10 (c) "based in whole or in part upon facts certified following an investigation pursuant to" Section 9 (c). Here, however, the Board issued no certification following its investigation pursuant to Section 9 (c) (*supra*, p. 7).

2. Petitioner urges (Pet. 8, 10, 13–14, 21–31) that there is no record support for the Board's finding that the Truce Agreement was not intended by the parties to apply in the event one of the parties left the A. F. of L. (R. 518). The court below sustained the finding (R. 546–552), and there is obviously no occasion for review of the issue by this Court. Cf. *National Labor Relations Board* v. *Falk Corp.,* 308 U. S. 453, 461. Moreover, since the Truce Agreement is a unique contract, the question of its proper interpretation is not one of general importance.

In any case, the concurrent findings below are adequately supported in the record. The express purpose of the agreement was to adjust a "jurisdictional" dispute and it provides for an "appeal" by the Longshoremen to the A. F. of L. convention (R. 436). It cannot be supposed that the parties intended to have the A. F. of L. remain as judge in a controversy between one of its affiliates and a union which had become affiliated with the C. I. O. Furthermore, petitioner's unsuccessful effort to secure a "supplemental" agreement to cover the contingency of the Longshoremen's withdrawal from the A. F. of L. (*supra,* p. 4) is in itself significant proof that the agreement as signed was not to apply in such event (see R. 551–552).

The cases cited by petitioner (Pet. 10, 25–27) are not in conflict. They merely enunciate the

general principle that where performance of a contract may be rendered impossible by a condition which the parties know may occur and against which they make no provision, performance is not excused by the occurrence of the condition. In this case, however, the question is not of excusing performance upon the occurrence of a condition rendering performance impossible, but of ascertaining the nature of the obligation assumed by the parties in the first instance.

Moreover, petitioner's contention concerning the applicability of the Truce Agreement despite secession from the A. F. of L. is inconclusive even if true. Although the Board did not pass upon the question, we think it reasonably clear that, by agreeing to be "bound" by the Truce Agreement (R. 508), the employees did not agree to designate petitioner as their collective bargaining agency if it won the convention decision, but only that petitioner would have sole jurisdiction as against the Longshoremen to carry on organizational activities. Consequently the Truce Agreement, even if applicable, cannot establish petitioner's majority status when it entered into the closed-shop agreements on November 15, 1937.

3. Petitioner attacks (Pet. 8–9, 10–11, 14, 32–34) paragraph 1 (c) of the Board's order (R. 528) upon the assertion that it improperly bars recognition of petitioner as the representative of "any"

of McKesson's employees. But the issue is not properly presented in this case. Petitioner raised no question in the court below concerning the provision; it was not challenged either in the petition for review (R. 1–9) or in petitioner's brief. The court below made no mention of the provision in its discussion of the Board's order (R. 543–544, 556–557) and petitioner's petition for rehearing wholly ignored the point (R. 566–584). This Court has on numerous recent occasions indicated that under such circumstances it does not regard questions of the validity of particular provisions of Board orders as properly raised. *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board,* certiorari denied, No. 862, last Term; *Viking Pump Co.* v. *National Labor Relations Board,* certiorari denied, 312 U. S. 680; *J. Greenebaum Tanning Co.* v. *National Labor Relations Board,* certiorari denied, 311 U. S. 662; *Subin* v. *National Labor Relations Board,* certiorari denied, 311 U. S. 673.

In any event, petitioner's challenge misconstrues the meaning of paragraph 1 (c). That paragraph requires McKesson to cease and desist from (R. 528):

> Recognizing or in any manner dealing with said Warehousemen's Union, Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of

> America, as the exclusive collective bargaining representative of any of its warehouse employees, unless and until said labor organization is certified as such exclusive representative by the Board.

The provision does not bar petitioner either from present recognition as representative of "any" employees or from "the right to represent any of its members" (Pet. 32). To the contrary, the provision bars recognition of petitioner only as "exclusive" (i. e., as majority) representative until such time as it is certified as such by the Board in proceedings under Section 9. Petitioner does not dispute that, given this meaning, the provision is addressed to the precise unfair labor practice in which McKesson was found to have engaged. Under the Act, such a provision is not only appropriate but mandatory. Section 10 (e); *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265.[9]

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[9] To allay any concern which petitioner may have concerning the proper interpretation of the provision (though the Board perceives no ambiguity), the Board hereby undertakes that, for the purpose of any further proceedings in the court below on contempt or otherwise, the provision shall have the meaning above ascribed. Petitioner's claim of conflict with *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197 (Pet. 10, 33–34) disappears, of course, with the proper reading of the provision.

CONCLUSION

This is a unique case, turning upon its own particular facts. The decision below is correct and involves no conflict. The petition should, therefore, be denied.

Respectfully submitted.

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OCTOBER 1941.